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FEDERAL TRADE COMMISSION

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For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

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FEDERAL TRADE COMMISSION

IN THE MATTER OF:)
CAN-SPAM REPORT TO CONGRESS.)
) Matter No.:
) P044405
)
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WEDNESDAY, JULY 27, 2005
PM SESSION
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

The above-entitled matter came on for
conference, pursuant to agreement, at 3:08 p.m.

1 APPEARANCES:

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

4 CATHERINE HARRINGTON-MCBRIDE, ESQ.

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10

11 ALSO PRESENT VIA TELEPHONE:

12 TREVOR HUGHES, ESPC, NAI

13 TONY HADLEY, Experian

14 JENNIFER LEUER, Experian

15 BEN ISAACSON, Experian

16 QUINN JALLI, Digital Impact

17 ELISE BERKOWER, DoubleClick

18 JOSH BAER, Skylist and UnsubCentral

19 JERRY CERESALE, Direct Marketing Association

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P R O C E E D I N G S

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MS. HARRINGTON-MCBRIDE: Thanks very much. Hi, everybody. I think we may have been together longer than any of us even knew. It's somewhat of an odd start. Thank you for your patience. I promise you the rest of the call will be extraordinarily well conducted and extraordinarily interesting. So any of you who are up to other things today and only taking time to do this as favor, I promise you, you will not be wasting a moment beyond those seven minutes at the beginning.

12

13

14

Thanks again to everybody for joining the call. I think I overheard Jerry, you were explaining how it is you came to be a member of the ESPC.

15

16

MR. CERESALE: That's right. Just as long as Trevor doesn't try to get news from me.

17

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MR. HUGHES: I'm sending the invoice right now, Jerry.

19

20

21

22

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24

MS. HARRINGTON-MCBRIDE: We had to know that there would be collateral issues. We are trying to talk with as many professionals who have an understanding of the CAN-SPAM Act and the effectiveness as we can, so I appreciate the indulgence of the ESPC in allowing Jerry to interlude.

25

We're going to begin the call with a quick role
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1 call so that we know for the record who is on. I think
2 you've heard that the operator has announced the call
3 will be recorded. In addition, we have Debbie Maheux
4 from For The Record on the call. Debbie, you're there?

5 MS. MAHEUX: Yes, Katie, I'm here

6 MS. HARRINGTON-MCBRIDE: Great, thank you.

7 Debbie will be taking down our every word, and so we're
8 going to be grateful to her for that, but one thing
9 we're going to have to do is make sure she knows who is
10 on the call so let me just begin. Trevor Hughes, you're
11 here?

12 MR. HUGHES: I'm here, Katie.

13 MS. HARRINGTON-MCBRIDE: I thought I heard you.
14 Tony Hadley.

15 MR. HADLEY: I'm here. Thank you.

16 MS. HARRINGTON-MCBRIDE: Hi, Tony. Jennifer
17 Leuer?

18 MS. LEUER: Yes, I'm here.

19 MS. HARRINGTON-MCBRIDE: I probably butchered
20 that last name.

21 MS. LEUER: No, actually it was great.

22 MS. HARRINGTON-MCBRIDE: Great. I used to work
23 with a Paul Leur, close spelling, so I had a little leg
24 up. Ben Isaacson.

25 MR. ISAACSON: Yes, I'm here.

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1 MS. HARRINGTON-MCBRIDE: Hi, Ben. Quinn Jalli?

2 MR. JALLI: I'm here.

3 MS. HARRINGTON-MCBRIDE: Great. Elise Berkower?

4 MS. BERKOWER: Present.

5 MS. HARRINGTON-MCBRIDE: Super. Josh Baer.

6 MR. BAER: Yes, I'm here.

7 MS. HARRINGTON-MCBRIDE: And, Jerry, I know
8 you're there?

9 MR. CERESALE: Yes, I'm here.

10 MS. HARRINGTON-MCBRIDE: Terrific. I'm here
11 from the FTC. I'm Katie Harrington-McBride. I work in
12 marketing practices. I've met several of you, and I'm
13 here joined today by Allyson Himelfarb, who wants her
14 last name to be McBride, but we haven't actually yet
15 completed that legal transaction.

16 Allyson set up the call and is an enormous help
17 in the work we're doing. Also joined by Mike Davis, an
18 attorney in marketing practices and by two of our summer
19 interns, Matthew Davis and Danielle Motts, who have been
20 already helping out a lot as we work on this report, and
21 will be continuing to work with us as they end up their
22 summers here.

23 So with that roll call begun, let me give you a
24 you a little bit of background of what we're trying
25 going to try to accomplish. As you know, in 2003,

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1 December, Congress enacted the CAN-SPAM Act, which among
2 other things directs the FTC to draft a report on the
3 effectiveness and enforcement of the Act, and that
4 report is due to Congress no later than December 16 of
5 this year.

6 Obviously the FTC has been in the process of
7 gathering data since the passage of the Act. This
8 interview today with members of the ESPC and with Jerry
9 will be an opportunity for us to transcribe for the
10 record your thoughts and views about the effectiveness
11 of the Act. This interview is just one of several ways
12 that the FTC is gathering information. That might be
13 relevant to the report to Congress.

14 Because today's call is being transcribed for
15 the record by a court reporter, it's very important that
16 when you wish to speak, you begin by stating your name
17 and affiliation, for example, this is Katie from the
18 FTC. If you don't remember, a whole team of us will
19 gang up on you, so it will just be a bit little more
20 efficient if you can try to remember that protocol.

21 Finally, and just to be absolutely clear, your
22 views here today that you express will be transcribed
23 for the record and may be appended to the report to
24 Congress or otherwise made public, just so everybody is
25 clear on that.

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1 Are there any questions before we begin? Okay.

2 We're going to break today's call up into four
3 main parts. We're going to cover four topic, three of
4 which are specific questions that Congress posed in the
5 CAN-SPAM Act and asked that we address in our report,
6 and the fourth is an overview of the Act.

7 So the first of the topics is whether there are
8 marketplace developments or technological changes since
9 the passage of the Act which may affect its
10 effectiveness or practicality. We'll secondly talk
11 about the extent to which the international transmission
12 of Emails may affect the effectiveness of the Act and
13 any suggestions for changes that you may have.

14 Thirdly, we'll tackle the question of ways in
15 which consumers, especially children, can be protected
16 from obscene and pornographic material sent via Email,
17 and finally, as I noted, we'll go over the actual
18 provisions of the Act one by one and talk about their
19 effectiveness and enforcement.

20 So we'll begin with the first issue, whether
21 there are any marketplace developments or technological
22 changes since the passage of the Act in December of 2003
23 that may affect its practicality or effectiveness, and
24 specifically here, I guess one question that Congress
25 seems keen to know about are whether there are new or

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1 increasingly used methods by which consumers are viewing
2 their Emails that may have an impact on the
3 effectiveness of the Act.

4 Here again I'm thinking anyway that we're
5 talking about mobile devices and their increased usage
6 as tools to view an Email and whether that presents any
7 impediment to the effectiveness of the Act.

8 MR. HUGHES: Katie, it's Trevor. Why don't I
9 start? It's Trevor Hughes from ESPC. It's great to be
10 here with a number of our members.

11 Let me address the wireless issue secondly, but
12 I think there have been some really, really significant
13 developments in the marketplace since the passage of the
14 CAN-SPAM Act, and I think most notably is that we have
15 seen the rise and broad implementation of Email
16 authentication.

17 One of the things that we feel strongly about in
18 ESPC is the CAN-SPAM Act really has been as effective as
19 it could be as a legislative tool in response to spam,
20 but that we see technology as one of the primary tools
21 in responding to spam more holistically across the
22 entire marketplace.

23 On that front, I think the CAN-SPAM Act and I
24 think the FTC's leadership under the CAN-SPAM Act has
25 been really helpful in promoting sender accountability

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1 through Email through authentication, and we've seen a
2 couple major standards emerge, Sender ID and DKIM.

3 I'm actually quite happy to say that two weeks
4 ago, the DMA, the ESPC, Microsoft and others sponsored
5 an Implementation Summit For Authentication in New York
6 City, and we had over 500 Email marketers and large
7 senders and people from the Email industry working on
8 implementing authentication, and that is a very, very
9 promising development in the marketplace.

10 One of the reasons that authentication helps the
11 CAN-SPAM Act is that authentication allows us to have a
12 better understanding of who is sending message, and in
13 better understanding who is sending the message, it
14 gives the FTC, state AGs and others much better tools to
15 go after people who violate the CAN-SPAM Act.

16 It really gives law enforcement and other
17 enforcement officials the ability to pursue, with much
18 greater precision than perhaps existed a year ago, those
19 who are perpetuating fraud and really gumming up the
20 work in the Email world. So I think the biggest
21 developments since the passage of the CAN-SPAM Act is
22 the broad implementation of authentication technologies.

23 With regards to the wireless devices, I think
24 it's fair to say that we have seen growth in Email being
25 accessed from many different types of devices, but I'm

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1 not sure if we've seen significant differences created
2 by those channels.

3 Clearly, clearly, the FCC Wireless Registry has
4 been implemented and has been used. We continue to
5 actually have some challenges, some concerns associated
6 with that, but I think that overall we are seeing that
7 the types of accountability tools that are being
8 promoted in the marketplace through authentication and
9 reputation are really helping us regardless of which
10 device is actually receiving the Email.

11 MS. HARRINGTON-MCBRIDE: Thank you, Trevor.

12 MR. CERESALE: This is Jerry Ceresale from DMA,
13 and I agree with Trevor, particularly on the
14 authentication, that it's working, and I think when the
15 Trade Commission did its response as to whether there
16 should be a Do Not Email List, the Commission wanted, in
17 essence, through those to pass the ball into the hands
18 of the mailers and service providers, et cetera, to deal
19 with authentication, which the Trade Commission thought
20 was a good way to try and help with enforcement, if
21 CAN-SPAM is one leg, enforcement, technology and so
22 forth.

23 I think that the industry has started to take a
24 good first step in authentication. We have more to go,
25 as you go in to maybe reputation things and so forth,

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1 but as we go forward in that direction, the industry is
2 working on authentication.

3 I also think another point that Trevor didn't
4 make was we find from the Internet service providers,
5 and I know you're going to talk to them or have already
6 spoken with them, Katie, is that they have done a better
7 job at filtering, and we understand from some of the big
8 ISPs that they now have new and better techniques at
9 filtering that they're just going to have to keep
10 changing as spammers, trying to get around it, work hard
11 at it, but I also think the technology, the filtering
12 technology has improved dramatically since the CAN-SPAM
13 Act was passed.

14 With regard to the wireless, we did get from the
15 FCC a change and a correction and a sorting out of its
16 list and to make sure that those domains on the FTC list
17 were truly just wireless domains, not wireless and
18 landline domains, so that has been settled.

19 I think that at the moment we currently have a
20 lot of wireless devices, but many of them receive Email
21 from a land based system, similar to a Blackberry that I
22 have. You receive the Email coming through the DMA
23 server, and I get it both on my computer at the office,
24 and I receive it on the Blackberry walking with me as
25 I'm trying to hide from my bosses but can't.

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1 So that is in large part where I think a vast
2 majority of business wireless device is there. The
3 Communications Commission has ruled in essence that you
4 can't send an unsolicited Email transmission or text
5 transmission to anyone in a wireless device where they
6 have to pay to receive it, which would be generally most
7 of the Blackberries, the cell phone, text messages and
8 so forth. So we have a very different kind of legal
9 regime from CAN-SPAM as you look at wireless.

10 I think in the future, as we go more and more in
11 America and the world go more and more to wireless
12 technology, that that's going to change dramatically the
13 view of looking at this type of system for
14 communication, creating some problems for marketers and
15 so forth of what are you going to do. The same thing as
16 we have with telephone as more and more people go to
17 wireless devices solely on telephone as well.

18 I think right now, we still have a situation
19 where it's basically predominantly land based with a
20 decision on the recipient's part to also have it sent to
21 a wireless device in the wireless arena.

22 MS. HARRINGTON-MCBRIDE: Okay, Jerry. Thank
23 you. This is Katie. I guess something Jerry says
24 reminds me that I have forgotten to tell you one of the
25 rules of our game and that is that you are welcome to

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1 use your crystal ball. To the extent that you're able
2 to predict the future and say, We don't see it happening
3 yet, we don't think it's problematic today but we think
4 that eventually we may see problems with that, that's
5 very helpful for us.

6 Obviously any legislation that's meant to
7 regulate an ever changing technology is going to have to
8 be subject to review periodically, and to the extent
9 that we can point out in our report to Congress areas
10 where there may be change in the coming year or two or
11 five or ten, that would be helpful, so feel free to
12 opine in that way.

13 I guess my second follow-up would be to say that
14 two things that we hear or have read in some of the
15 reports we reviewed are that wireless users, people who
16 are using mobile devices may be handicapped in two
17 specific ways. If that is their only access point, they
18 would be handicapped perhaps in two specific ways
19 regarding CAN-SPAM.

20 That is, that they may not have an ability to
21 exercise their right to opt-out, and secondly, that they
22 may not have full benefit of viewing of subject lines
23 because of space considerations, because of smaller
24 screens, and so we're sort of testing those propositions
25 that we've seen in print against our expert panel.

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1 So if you have any thoughts about those two
2 ideas specifically, we would be curious to hear what you
3 think.

4 MR. BAER: This is Josh Baer from SkyList, and I
5 am glad you offered up the crystal ball because I
6 actually have one right here.

7 MS. HARRINGTON-MCBRIDE: Great.

8 MR. BAER: One of the things that I think it's
9 been an amazing educational process to me watching all
10 of this evolve and put out through CAN-SPAM, as well as
11 watching the technology happen at the same time, and in
12 some ways when CAN-SPAM happened, I naively thought that
13 everything was going to happen overnight, that in a
14 month or two, everyone would have figured out compliance
15 with the law and the rules of it, that everybody would
16 be on board and working with it, that it would have an
17 immediate impact, and I thought the same thing around
18 authentication.

19 The reality of it has been that these things,
20 while I feel very confident that they're all moving and
21 moving in the right directions, they're much bigger
22 mountains to move, and they move much slower.

23 So, for example, I feel like just now with the
24 recent rulemakings and clarifications on CAN-SPAM, as
25 well as technology solutions that have come into play to

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1 help people comply in a cost effective way with
2 suppression and for privacy requirements, that people
3 are comfortable with it and they get it, and we're
4 seeing marketers that stopped marketing through Email
5 because of CAN-SPAM, because they just didn't understand
6 it, starting to get back into it, and they've been doing
7 that more and more probably over I would say the past
8 six months.

9 So I see that having an impact on people
10 understanding it, and I think the technology and the
11 authentication works the same way. We're just now,
12 almost a year, year and a half later seeing the major
13 ISPs such as Microsoft and AOL and Gmail and Yahoo
14 making commitments and time schedules as to how they're
15 going to incorporate and start using the authentication
16 as part of their spam filtering and also as part of
17 identifying legitimate mail, so it's just happening now.
18 They just announced it.

19 We're not seeing the results of it yet. They're
20 just start to playing with it, but it's the right thing,
21 and it's happening, and I think we all feel very good
22 about where it's headed, but it takes time.

23 On the wireless issue, I think Jerry hit on a
24 very good point showing that his Blackberry gave him the
25 ability to control where the messages went and how he

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1 viewed them. I also use a Blackberry and I also use SMS
2 text messaging, which is a different form of mobile
3 communication or mobile text messaging.

4 One of the things that I think people get very
5 confused about is they think about Email coming into
6 their Blackberry or their phone like a regular text
7 message, which for me my phone goes off like someone who
8 is calling me. It's very interrupting, so I wouldn't
9 want to get all my Emails in that way, but actually the
10 tools that are evolving such as the Blackberry and Palms
11 and Windows devices, they really have pretty decent
12 tools in place to allow you to navigate an Email box the
13 way you navigate Email differently than you would text
14 messages.

15 So as I get my hundreds of Emails all day my
16 phone is not ringing. It's not interrupting me. They
17 come in in a different way, and I'm able to navigate
18 them in a different way, and I do have the ability to
19 expand the subject line as well as to follow links and
20 unsubscribe from Emails.

21 MS. HARRINGTON-MCBRIDE: Great.

22 MR. ISAACSON: This is Ben Isaacson, Experian
23 Email and Cheetah Mail, and I would like to offer a
24 little bit of additional clarity and maybe even in the
25 crystal ball scenario where when we're talking about an

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1 Email address, I think the nature of Email is
2 portability, so as Jerry mentioned, the Email address
3 follows you.

4 While that may not be as critical on the regular
5 domain being ported over to a wireless domain as that
6 seemingly is not part of the FCC requirement, but the
7 concern that I am concerned about, that it may come up
8 in the future is the fact that a wireless domain could
9 have portability to other areas.

10 So, for instance, any wireless domain provider
11 could, in fact, add a free web access to that domain's
12 Email, so in that sense they could go online and view
13 their wireless messaging rather than viewing it on their
14 cell phone. They could view it through their computer,
15 so the nature of Email by itself enables portability.

16 I would imagine as wireless carriers add
17 increased functionality for users and increased loyalty
18 for users, especially as things move along with the
19 broadband developments through a wireless device, we
20 will see these barriers breakdown even further, and so
21 the concern is that wireless messaging then becomes the
22 same as any other messaging that we get over our
23 landline computers.

24 MS. HARRINGTON-MCBRIDE: Okay.

25 MR. BAER: This is Josh Baer. One other follow
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1 up to Ben's point is exactly what you said. You could
2 do it right now. My Blackberry account that I
3 mentioned, there's a web page that I can go to, and I
4 can see everything on my Blackberry, delete Emails,
5 respond to Emails, follow links all from a web page on
6 my screen.

7 MS. HARRINGTON-MCBRIDE: Any further thoughts on
8 that topic or should we move ahead?

9 All right. One issue that came up early on, I
10 think Trevor you hit on this, and this is another one of
11 our bullet points we want to get through on this
12 question of whether there are marketplace developments
13 or changes in technology is to really get all the way
14 through the topic of authentication and talk about
15 specifically what the interplay is between
16 authentication and the CAN-SPAM Act and whether the
17 attempts, that is, authentication has any impact on the
18 effectiveness and enforcement of the Act or on
19 practicality of the Act.

20 So if anyone has any comments specific to the
21 relationship between authentication and the Act, it
22 would be very helpful to hear those.

23 MR. HUGHES: This is Trevor again. Let me offer
24 a few thoughts, and I think Josh and Quinn and others
25 might have additional color for this.

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1 I think there's both a direct relationship and
2 an indirect relationship. I think we need to look at
3 technology and legislation as I guess synergistic tools,
4 symbiotic tools in the fight against spam. Each
5 performs a specific purpose.

6 I think technologies, specifically
7 authentication, can help legislation in that it allows
8 us greater accountability and better mechanisms to get
9 after the folks who are breaking the law. So
10 authentication I think helps with that. It's not a
11 complete answer in terms of CAN-SPAM enforcement, but it
12 definitely helps. It pushes it in the right direction.

13 I guess the other sort of indirect effect is
14 that the better authentication tools become and the more
15 we are able to layer on meaningful accreditation and
16 reputation systems on top of authentication, the more
17 legitimate mail is going to be protected, and if we can
18 protect legitimate mail, then ISPs and others receiving
19 the mail will be able to be that much more aggressive
20 with everything else that comes over the transom, and
21 that's a good result as well.

22 So that's less sort of directly tied to the
23 CAN-SPAM Act, but I think it does pursue the goal of
24 reducing the amount of spam in people's inboxes and
25 reducing the number of economic effects that exist in

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1 the marketplace for people to continue spamming.

2 MS. HARRINGTON-MCBRIDE: Okay.

3 MR. BAER: This is Josh Baer from SkyList again.
4 Obviously I agree with the points Trevor made, and
5 trying to add color there, I think an important mistake
6 that people make when sometimes considering legal
7 options, and I think when thinking about authentication
8 is that passing a law is going to help you find the bad
9 guys or even that authentication is going to help us
10 find the bad guys.

11 Having authentication in place isn't going to
12 make it so that you can track down all the really bad.
13 Deceptive porn spammers from overseas. They're not
14 going to use it, and once that they see that it would
15 allow to you track them down anyway, they would stop
16 using it.

17 No law that we pass, I believe, particularly
18 because of the scope of jurisdiction and other things,
19 right now is going to completely address the spam
20 problems. We're going to need technology solutions to
21 do that.

22 What authentication does do is allows us to just
23 kind of drop line in the sand, and to really separate
24 the legitimate people from the people doing really bad
25 things, and in that way, I think it's a good thing and

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1 it's going to continue to help us, but we have to
2 remember that the really bad people don't follow the
3 laws and aren't going to comply with authentication and
4 other things like that, and it's going to be technology
5 and reputation that will allow us to hold senders
6 accountable for the Email they send.

7 MR. JALLI: This is Quinn from Digital Impact,
8 and one of the things I think we can say with a great
9 deal of certainty is that had we been able to identify
10 and eliminate spam prior to 2003, we would not have had
11 the CAN-SPAM Act. There would have been no need for it.

12 And I think it's been stated in many forms, but
13 taking it to the next step of the two people before me,
14 authentication has really established some the framework
15 for a system where people must stand up, identify
16 themselves, and then of course moving forward, take
17 accountability for their behavior, and the
18 accountability is going to take place at either a
19 recipient or an ISP level.

20 I think where there becomes important for
21 CAN-SPAM and the federal government is that where
22 senders have, over a period of time, proven their worth,
23 taking accountability for their mailings and established
24 a level of compliance on the ISP and the recipient
25 level, where they start to behave badly, we will have a

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1 history of these sinners, and we will probably have even
2 a profile of who they are, and I think that in and of
3 itself makes enforcement easier because in working with
4 the ISPs, identifying the bad actors has always been the
5 trick of spam.

6 So I think when you asked the question, Will
7 this play out in terms of CAN-SPAM, I think undoubtedly,
8 and so I see a great deal of hope in both the technology
9 and the legal side of the future.

10 MS. HARRINGTON-MCBRIDE: Okay. We hit on the
11 question of ISPs filtering a little bit, so let's move
12 on to that.

13 To what extent is ISPs filtering different today
14 than it was at the time the CAN-SPAM Act was passed, and
15 what impact does this change, if any, and what impact
16 would it have on the CAN-SPAM Act?

17 MR. JALLI: This Quinn Jalli again. I'll chime
18 in here since this is one of the many hats I get to wear
19 at Digital Impact. I think filtering on the ISP level
20 has become much more intelligent, where once we filtered
21 on key words in the subject line, a process which I
22 would assert was very clumsy, or we filtered based on
23 volumes, ISPs are now taking, how do I say, user
24 feedback and applying it on a fingerprint methodology to
25 identify spammers.

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1 They're taking Smart filters. They're using
2 intelligent filtering processes that identify multiple
3 points in an Email that indicate that the Email may be
4 spam. They're aggregating information and sharing
5 across networks to understand better the behavior of
6 spammers, and more importantly I think they're using the
7 kind of tactics of spammers against them, identifying
8 the tools that spammers have used in the past to gain
9 access to their recipients.

10 So I think we're seeing a move towards a much
11 more intelligent and bayesian approach to filtering that
12 is working in the favorite of legitimate Email marketers
13 and enforces I believe the legal players to either get
14 out of the market because the cost of playing has risen
15 or forces them to take actions that are less effective.

16 MS. HARRINGTON-MCBRIDE: Okay. Quinn, let me
17 ask you a quick follow-up. This is Katie.

18 MR. JALLI: Certainly.

19 MS. HARRINGTON-MCBRIDE: That's a very, very
20 helpful overview, and I'm wondering if it's possible for
21 me to push you a little farther while you're still
22 wearing that hat and ask if you have any sense of the
23 chronology, if there are any points in the time line in
24 the last 19 months where you could say some new smarter
25 filtering method came online or is this all so

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1 incremental that it's very difficult to pinpoint dates
2 and time?

3 MR. JALLI: No, I think the evolution of
4 filtering has been natural. Certainly ISPs never wanted
5 to filter on volumes, for instance, because it's such an
6 imprecise tool, but that's the best they've had. In
7 fact, I can point to a time in 2002 when Microsoft said
8 their goal was to move to what they at the time
9 identified as Smart filtering, but have later identified
10 as a bayesian filter, which is a learned filtering
11 system.

12 More importantly over the last I think 19
13 months, what we're seeing across all ISPs is an
14 in-aggregation, if you will, of different methodologies,
15 identification based on authentication. If you're not
16 authenticating properly, we'll count that against you.
17 We'll use our recipient feedback. It's a move to
18 empower the consumer, and I think that's very much in
19 line with what the CAN-SPAM Act is trying to
20 incorporate, let's protect the consumer.

21 ISPs are doing there. They're incorporating it
22 also with their learned filter system. If you pass the
23 user feedback and you pass the authentication, then are
24 you sending something that is known by our filters to be
25 spam?

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1 So I think what we've seen over the last
2 19 months is really kind of the logical evolution of
3 filter rather than a seminal moment.

4 MR. HUGHES: Katie, this is Trevor. Let me add
5 a couple things. I think Quinn is exactly right, but I
6 would add one caveat to that, and that is this is the
7 experience that I think we've seen in most of the large
8 ISPs, and there's actually some hard stats on this.

9 AOL can provide them for you, but they reported
10 late last year that their spam in the inbox had dropped
11 by 74 percent from a year prior and that they had had a
12 reduction in the amount of spam also hitting sort of the
13 outside edge of their systems, but it was nowhere near
14 the 75 percent drop that they were seeing in AOL's
15 subscriber inboxes, which meant that AOL filters were
16 getting that much more intelligent.

17 I don't know if those numbers are replicable
18 across all of the major ISPs, but I think the major ISPs
19 are all working on secret formulas where they have
20 various types of weightings and systems to recognize
21 what is and is not spam, but false positives remain a
22 problem, and those are legitimate messages that don't
23 reach the inbox because of filtering.

24 There's a company called Return Path that has
25 been doing research on false positives for the past

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1 three years, and in their most recent study, the ISPs
2 that they looked at had false positive rates that in
3 some instances for some senders were hitting as high as
4 22 percent, which is very, very high and is suggestive
5 that one in five or one in four messages that you want
6 to receive might not be hitting your inbox.

7 Another company called Pivotal Veracity did a
8 study, and they broke out by the type of Email that was
9 being sent, and they found that in some cases,
10 transactional and relationship messages were hitting
11 false positive rates of about 18 percent.

12 I think largely what we're seeing is that those
13 delivery problems are emerging below the top ten, maybe
14 even the top 20 or 30 ISPs, where there is a huge number
15 of receiving gateways for Email, small regional ISPs,
16 corporate mail gateways, educational gateways,
17 governmental gateways where they don't have the
18 resources, the staff or the financial wherewithal to
19 create some of these secret formulas, these special
20 systems to really recognize spam as it's coming through,
21 and they resort to more blunt and really less precise
22 method.

23 So while I think the message is very good at the
24 large ISPs, and most of our members have staff who are
25 specifically responsible for ISP relations, people like

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1 Quinn, and they have very good relationships and good
2 delivery histories with the large ISPs, we continue to
3 see false positive problems in the marketplace, and I
4 think it's largely driven by the second 50 percent of
5 the ISP market, and that's made up by the smaller
6 receivers.

7 MR. BAER: This is Josh Baer again from SkyList.
8 I certainly agree with the previous comments. I think
9 there are three very specific things we've seen ISPs
10 adopt from a technology with respect to CAN-SPAM that
11 are having a big impact on spam and/or legitimate Email
12 delivery.

13 One of them is we've seen most of the big ISPs,
14 as Trevor said, the little ISPs are slower to follow but
15 we are seeing them follow, establish feedback loops,
16 something that Quinn talked about, which means users
17 have the ability to say, I like this, I don't like this,
18 this was spam or you filtered this as spam and it's not
19 spam.

20 That's data. It's really useful data that
21 they're using, and they're integrating into how they're
22 looking at the mail coming in, so that's really
23 important. It gives them tools they need, and they're
24 starting to give that feedback back to legitimate
25 senders so that they can use that information to send

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1 better Emails and to target their mail to people that
2 want it and make sure they don't send it to people that
3 don't.

4 White list or safe lists, sender accreditation,
5 things that are done on a global scale like Trevor said,
6 like Bonded Sender or Habeas, but also individual white
7 lists at major ISPs like Yahoo and AOL and others.
8 Many, many ISPs are starting to implement this or go
9 with a third party aggregator like Bonded Sender or
10 Habeas, and this gives tools for legitimate mail to get
11 in.

12 They recognize it's going to help their
13 customers get mail they want and allow them, as Trevor
14 said, to turn up the spam filters against all other
15 stuff and get more aggressive about things that's not
16 identified.

17 Finally, as I said before we're just now saying
18 the adoption of an authentication into the logic of spam
19 filtering, and Microsoft just released a bunch of stats,
20 I apologize for not having the details on hand, but
21 showing it's improving their ability to filter out spam
22 and to identify legitimate mail.

23 Finally, one last thing I think worth mentioning
24 here as we talk about how spam filtering technology has
25 changed, a major new issue over the past year or two

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1 that spam filtering has had to respond to is the issue
2 of zombie networks and viruses that take over many
3 computers and use them to send out spam and do it in
4 very nefarious ways, and to do that, they have had to
5 develop deep what they call threat detection networks
6 which companies like Iron Port and Cyber Trust and
7 Passini and others have developed because they have a
8 footprint across many thousand of computers around the
9 world, so they're able to identify immediately and watch
10 in realtime as viruses spread and as these zombie
11 computers are taken over.

12 And that type of filtering has become so
13 important that it really has started to outweigh the old
14 more blunt method like black lists and content filtering
15 like Quinn was mentioning, and I think that's a really
16 important development, specifically in spam filtering
17 that is really important today and has really changed
18 kind of the landscape of sending Email.

19 MR. JALLI: Katie, before we move on, this is
20 Quinn Jalli from Digital Impact again. I did what to
21 say I think it's important that all of us at least
22 acknowledge that since the CAN-SPAM has passed and it's
23 really forced the legitimate senders out of the woodwork
24 upfront with the ISPs, I think a much greater spirit of
25 cooperation has emerged between ISPs and legitimate

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1 senders, something that frankly didn't exist on the
2 level nearly that it does today in the CAN-SPAM era.

3 I think certainly that was brought about because
4 of not only the CAN-SPAM lobbying process, but also
5 because of the subsequent authentication seminars around
6 the subject. So I think that's important.

7 MS. HARRINGTON-MCBRIDE: Thank you. Josh has
8 led us off into the next area I wanted to cover. You
9 guys are I think anticipating my outline. I don't know
10 if word is getting around or if we're just too obvious,
11 but we wanted to talk a little bit about zombie drones
12 and what challenge they pose under the current CAN-SPAM
13 Act and could be done and the meshing of technological
14 solutions as well. Any other thoughts about that?

15 MR. ISAACSON: This is Ben Isaacson with
16 Experian and Cheetah Mail. I just wanted to say that,
17 yes, there are a number of ISPs, and as Josh mentioned
18 they're developing feedback loops, but one thing to note
19 in particular is what Microsoft has recently done with
20 their postmaster web site and Smart Network Data
21 Services, what they call it, where they are identifying
22 the IP address that are being sent into their networks
23 in realtime, and offering whether it's a sender like us,
24 who sends on behalf of many clients, or more notably
25 other ISPs to actually log-in and view all of the IP

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1 addresses on their network and see which ones may be
2 spiking volumes in realtime.

3 So when you see these kinds of spikes, you can
4 pinpoint those IP addresses and understand who actually
5 has access at what point to those IP addresses and try
6 to shut them down rather than keep sending through them

7 MR. BAER: That's a great point, this is Josh
8 again. I think some other things we've seen developed
9 is receiver or ISP's mailbox providers like Hot Mail and
10 like Earthlink and dial-up providers have recognized
11 that they are some of the largest senders on the
12 Internet, not marketers, that a lot of mail comes from
13 them, and a lot of abuse comes out of there, and we're
14 starting to see them take really positive steps to also
15 try to contain that from emanating from their networks
16 as opposed to just filtering them from coming in.

17 So I'm sure you've heard of things like Port25
18 blocking and other techniques they're putting in place.
19 This is also somewhere that authentication helps. It's
20 not a perfect solution, but it definitely helps in many
21 of the cases of this, and so these different things are
22 helping to make it less effective for zombie drones to
23 happen and are helping us to deal with them, both from a
24 legitimate side and from the filtering side.

25 Yet, at the same time it's important to

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1 recognize it is an arms race. Spammers are going to
2 continue to innovate. They're going to continue to
3 respond to the things we put in place, and they're going
4 to continue like with any other criminal activity to try
5 to find ways around, and we're going to have to continue
6 to be vigilant and adapt to that.

7 I think the difference here is authentication is
8 a really strong foundation to build that on and that we
9 think is going to help exactly with some of these new
10 varying threats like zombies.

11 MS. HARRINGTON-MCBRIDE: Okay. One last
12 question that I have before I'll ask the umbrella
13 question, do you have any other thoughts, and that is
14 recently the Pew Organization that has done several
15 studies on life on the Internet and the affect of spam
16 on the usage of the Internet, a recent study by Pew
17 found that while the volumes of Email as spam has
18 increased since the passage of the Act, that the
19 frustration of recipients is lessened.

20 I wonder if any of you have any thoughts or
21 would like to comment on that finding.

22 MR. BAER: Katie, can you give that again, so
23 that the frustration of recipients has lessened?

24 MS. HARRINGTON-MCBRIDE: Yes, so while people
25 seem to be getting more spam than ever, they seem to be

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1 somewhat less annoyed or frustrated by that.

2 MR. BAER: Let me speak to that because there's
3 actually a Pew study that came out just a week and a
4 half or ago or so that talks about phishing and Spyware
5 as well, and I think you kind of need to look at the two
6 things at the same time.

7 On the one hand, I think the Pew study does
8 indicate that consumers are getting more sophisticated
9 with regards to spam. I think everyone has now seen a
10 Nigerian general asking them to transfer bank account
11 funds, and they recognize that it is a fraud, and they
12 ignore it, so it just becomes background static in their
13 inbox, and they're easily able to address it quickly.

14 With that said, I think consumer education
15 remains one of the glaring gaps in our tool kit in
16 response to spam. R.E. Schwartz and the CDT did some
17 great research two years ago on where spam comes from,
18 and I think consumers still don't understand that if
19 they post their Email address in a public chatroom or on
20 a public web site, that that's going to get scraped and
21 dumped into spam databases.

22 So on the one hand, I think that consumers are
23 getting smarter about recognizing spam in their inboxes,
24 but there is still a lot of work to do in educating
25 consumers so that they can be even smarter and actually

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1 take some proactive steps to protect their Email address
2 and not get spam in the first place.

3 There's a darker side to this, too, and that's
4 phishing, and I worry about phishing as a fundamental
5 threat to the trust that currently exists in ECommerce
6 and Email more generally.

7 Pew released some stats just recently that
8 suggested that consumers are starting to shy away from
9 certain web sites because they're concerned about
10 Spyware and that consumers have very real concerns about
11 phishing, and I think the more we see phishing emerge in
12 the marketplace as a real threat of fraud and harm to
13 consumers, the more we are going to see ECommerce and
14 legitimate online businesses suffer and consumers really
15 suffer because they won't be using those tools, those
16 powerful tools anymore.

17 It seems like we keep coming back to
18 authentication today, but more than any problem and
19 perhaps more than spam, I think phishing is one thing
20 that is more addressable, more resolvable through good,
21 strong authentication or reputation systems than any
22 problem we have in front of us.

23 So there's a big message about consumer
24 education, that there's still more work to be done, that
25 consumers are smarter, but we do see real storm clouds

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1 on the horizon with regard to phishing as a result to
2 ECommerce generally.

3 MS. BERKOWER: This is Elise Berkower from
4 DoubleClick. You might be interested in the 2005
5 Consumer Email Study that DoubleClick has done. We've
6 done one annually since 1999, and a couple of the things
7 that it shows is that, as Trevor said, consumers are
8 getting more sophisticated, but they're also using the
9 tools that have been made available to them by their
10 ISPs.

11 A lot of them -- most of them -- have multiple
12 Email accounts and use different Email addresses for
13 different purposes, and they also use their bulk folders
14 very liberally, so what you may have been seeing in the
15 results of the Pew study may be due in part to some of
16 the actions that the consumers are taking in terms of
17 taking control of their inboxes and we would be very
18 happy to share the results of the study with you.

19 MS. HARRINGTON-MCBRIDE: Okay, great. Thank
20 you.

21 MR. CERESALE: This is Jerry from DMA. One of
22 the things that we found in this as we look at consumers
23 and the impact of mail coming to them is that it's not a
24 complete study at all, but more anecdotal. We've done a
25 couple of small focus groups, which you can't

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1 specifically blow up at all, but we found that
2 individuals that used the Internet using an awful lot of
3 ECommerce, and that would mean responding to Emails,
4 also going to web sites, et cetera. All of them, every
5 single one of them in our focus groups that did that and
6 used that knew that there was an opt-out or a non or
7 unsubscribe on the Emails, that now it appears to us
8 that the users of the Internet understand that an Email
9 coming to them at least must have an unsubscribe to it.

10 Whether or not it works and so forth is
11 something for the Trade Commission, as they've done
12 recently in some enforcement, to work on, but I think
13 that part of CAN-SPAM, part of the CAN-SPAM was to
14 educate consumers, and it has worked in that sense.
15 Besides using what Internet service providers, Email
16 service providers, anyone are offering consumers, they
17 are also aware of what's supposed to be in an Email, at
18 least a lot of them that get it, and they are aware of
19 that.

20 Now, spammers can try to mimic that as well and
21 so forth, but from the education standpoint, CAN-SPAM
22 for the real heavy users has been probably pretty go.

23 MS. HARRINGTON-MCBRIDE: Boy, at the rate you're
24 going, I feel as though my time might be better spent
25 back at my desk because you are proceeding through my

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1 outline and I didn't distribute it.

2 Jerry raised a point about people's awareness of
3 their opt-out rights, and we'll talk more about the
4 specific provisions of CAN-SPAM that allows that, but
5 now seems like a good enough time to jump into the
6 question: What sorts of risks are inherent in opting
7 out?

8 There's been a lot of anecdotal evidence talked
9 about and various articles that we've read that opting
10 out can lead to the installation of malware. There's
11 the ever present fear by recipients that if they do
12 opt-out, all they've done is waive a flag and notified a
13 spammer that they're a live address.

14 What sorts of data might you have or anecdotal
15 evidence might you have about the real inherent risks in
16 opting out?

17 MR. BAER: This is Josh Baer from SkyList. I
18 think that's a great question, and it's somewhere that
19 there's been a lot of misinformation and bad
20 communication. I believe there was actually an FTC
21 study that you yourself did most recently of all the
22 ones that I've seen, maybe in the past year or so, that
23 found that the general impact of unsubscribing from the
24 Email you got was to get less Email.

25 MS. HARRINGTON-MCBRIDE: That's right.

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1 MR. BAER: And I firmly believe that that's
2 still the impact out there, and if there's really any
3 good impact that CAN-SPAM has had on marketers, as Jerry
4 said, it's been making them very aware of unsubscribes
5 and much more diligent of making sure they're compliant.

6 I should caveat that I also am CEO of a company
7 called UnsubCentral, which is a provider of suppression
8 list services and compliance services for CAN-SPAM, so
9 we work with all the leading marketers to help them make
10 sure that their suppression lists are kept up to date,
11 that any third-party that they work with are able to
12 securely scrub against those and make sure that they
13 don't Email anyone that's asked not to hear from them,
14 and people are very aware of that now.

15 MR. HUGHES: Katie, this is Trevor. Let me add
16 a couple things to this. I think that it is absolutely
17 critical that we have a trustworthy, unsub process in
18 the marketplace. The opt-out, the unsub in each mail is
19 really the mechanism in the CAN-SPAM Act that gives
20 effect to consumer choice with regards to Email, and
21 without an ability to trust that unsubscribe process,
22 we're really in a bad situation.

23 There was a time 18 months ago, two years ago,
24 when pretty much everywhere you turned in the
25 marketplace that the advice was, Don't unsubscribe, it

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1 just gets more spam into your inbox, you end up with
2 more spam. I think we've moved away from that, and I
3 think that there's a recognition that legitimate
4 marketers are recognizing processing and handling unsub
5 requests appropriately. They're definitely required to
6 under the CAN-SPAM Act.

7 So the question becomes how do you distinguish
8 between a legitimate unsub and a message that is
9 fraudulent or that's trying to do something nefarious,
10 and I think this plays back to the phishing problem and
11 to the other concerns that we've described.

12 Again I don't want to harp too much on
13 authentication, but I think that all roads lead back to
14 this. Authentication, reputation and accreditation
15 technologies give us the tools to help us have better
16 solutions around that, but I think it is very important
17 to note that both work that the FTC has done and work
18 that ESPC has done has shown that the worst case
19 scenario for clicking an unsubscribe is that nothing
20 happens, and that more likely than not, you're dealing
21 with a legitimate player in the marketplace, and they
22 handle it appropriately and suppress your name going
23 forward.

24 MR. BAER: This is Josh Baer. It's not to say
25 those things couldn't happen or no one has ever done

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1 that, but they're not common thing that are happening,
2 and it's definitely safe to unsubscribe today.

3 Some other good news is like a lot of the other
4 technology things that are happening, as Trevor pointed
5 out, we need a way to distinguish between good
6 unsubscribes and safe ones and just spam out there,
7 whether we're going to get a virus or not, we don't even
8 want to go near them, and fortunately the ISPs,
9 particularly over the past six months, have recognized
10 this, and all of the major ISPs have agreed and made
11 verbal commitments and are working on technology
12 solutions to provide an authenticated, trusted
13 unsubscribe mechanism within the user interface so that
14 users see a button that says, I want to unsubscribe, and
15 it only shows up for legitimate authenticated senders
16 and they can click that, know it's safe and be able to
17 know that they're not going to get any further Email
18 from that sender.

19 That's another really good thing that's
20 happening right now.

21 MS. HARRINGTON-MCBRIDE: I'm sorry to interrupt,
22 this is Katie. Josh, any sense of when that's going to
23 be operational?

24 MR. BAER: You know I know of commitments from a
25 smaller ISP with around a million users to implement

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1 this using a technology called LashBack, which is an
2 unsubscribe reputation monitoring service and a consumer
3 protection service for unsubscribes, so I know that's
4 going to be coming out in the next few months.

5 The bigger ISPs like AOL, Microsoft and Yahoo
6 obviously take a long time to introduce technologies and
7 roll things out to their user base, so my best guess
8 would be it would still be probably nine months, in that
9 range, but I would love it to be faster. It's something
10 I personally really push towards.

11 MS. HARRINGTON-MCBRIDE: This whole thing with
12 CAN-SPAM is teaching you that patience is a virtue.

13 MR. BAER: Yes. Another thing, going on, that I
14 also have been personally involved in through ESPC is
15 standardization of the mechanisms for ISPs to
16 communicate both complaints but also unsubscribes from
17 one ISP to another or back to senders, and so recently,
18 I was on a working group with AOL and Yahoo as well as a
19 number of other ISPs working to define a standard format
20 so that ISPs can send an Email that says, This user
21 wants to unsubscribe or this person has complained about
22 the Email that you've sent, and both AOL and Yahoo have
23 committed to implementing there.

24 AOL is beta testing it right now. Yahoo I know
25 is in the process of implementing it, and think that's

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1 only going to be a hallmark or a flag of what's to come
2 of more ISPs providing this kind of feedback, providing
3 standard ways for users to unsubscribe and the
4 consequence of it being an improvement in end user
5 consumer confidence, that they're going to feel like, I
6 understand the Email I'm getting, I know there's a way
7 to stop it if it's legitimate, and if it's not I can
8 delete it or report it as spam.

9 MR. ISAACSON: This is Ben Isaacson with
10 Experian and with Cheetah Mail. I hate to caveat, but I
11 mean, I agree with what Josh was saying, but I do have
12 to add a caveat in the sense that as we had communicated
13 in the notice of proposed rulemaking process, while the
14 standardization of the unsubscribe may be effective for
15 a certain number of mailers, what we've found through
16 our relationships with many different mailers,
17 especially those with financial transactional
18 relationships with customers, is that the process for
19 collecting an unsubscribe can be expensive and require
20 authentication.

21 As Trevor has noted the phishing problem and
22 identity theft problem is one that we're very cognizant
23 of, so we have asked many of our clients to go a step
24 further and create preference centers and create
25 processes to ensure that the person that you're sending

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1 communications to is the right person, and that when
2 they do want to exercise choice with you, that is to the
3 right channel, and perhaps more importantly, as per the
4 extensive compliance processes with CAN-SPAM, a lot of
5 clients have chosen to differentiate commercial mail
6 from transactional or relationship and have different
7 streams of mail that may be coming across.

8 So in order to process an unsubscribe, we want
9 to make sure that the clients are being as clear as
10 possible to the recipient exactly which list or in some
11 cases which sender they are removing that unsubscribe
12 from.

13 So while we certainly are engaged in the process
14 with ISPs, and in fact as Josh very well knows, there is
15 a standard out there about listing your unsubscriptions
16 mechanism in the header of a message, and in fact
17 Cheetah Mail is one of those ISPs that does list that
18 for certain clients. We do want to encourage the
19 continued authentication process to ensure that
20 unsubscriptions are being handled appropriately.

21 MR. BAER: Yes. Just to even expand on that, I
22 found it almost fascinating to look at the subtleties of
23 looking from one perspective and saying, Hey, shouldn't
24 we make it super easy for people to unsubscribe, it's
25 just click the link, and they should be able to

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1 unsubscribe right away, and it will tell them, You have
2 unsubscribed.

3 Then at the same time, working at some other
4 applications where someone forwards the Email to someone
5 else, someone else could be clicking that link, it could
6 be something sensitive or financial or other things
7 where at least currently getting into the unsubscribe
8 might show you another list they're subscribed to which
9 might be personal information or other things like that.

10 That's been a really tough thing to balance is
11 how do we recommend clients handle these things when
12 they have these very real concerns, and at the same time
13 we usually try to just fall back to, we've got to make
14 it really super easy for people to unsubscribe because
15 the consequence of somebody right now not being able to
16 unsubscribe is just far too serious.

17 MS. HARRINGTON-MCBRIDE: Let me ask if there are
18 any other last thoughts, in the next minute or so, of
19 other areas where there have been marketplace
20 developments or changes in technology that we should
21 consider as we go forward with our report?

22 MR. HUGHES: The one thing I do want to add,
23 we've spoken a lot about authentication. The Email
24 Service Provider Coalition has long been a proponent of
25 authentication with reputation and accreditation built

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1 on top of it to provide a more robust mechanism for
2 recognizing not only who is sending the mail but what
3 type of mail they're sending, what type of sender they
4 are and what their reputation has been over time.

5 And I'm happy to report that there are market
6 forces emerging and reputation services providers have
7 emerged in the marketplace. So there's Habeas and
8 Bonded Sender and Good Mail and more that we're aware of
9 in the wings, and all of these I think are important
10 tools.

11 We've got some work to do around making sure
12 that they are standardized in a way so that we don't
13 segment the market to a degree that becomes unworkable
14 for large senders, but largely we're very satisfied to
15 see that not only has authentication gained great
16 purchase in the marketplace and really has strong
17 footing and is moving forward, but also there is a
18 growing recognition of the need for accreditation and
19 reputation systems on top of that, and there are a
20 number of companies that have received pretty
21 significant funding to make that happen.

22 MR. CERESALE: Katie, this is Jerry Ceresale
23 again, sorry, DMA. One thing that I think looking a
24 little bit into the short-term future as to what
25 happens, and when you're doing the report, I don't know

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1 how the Commission is going to do this, is looking at
2 the multiple senders, the joint advertisers, that kind
3 of thing, who is the sender, whose opt-out has to
4 appear, whose opt-out works, what's required, that is
5 the possibility with multiple advertisers choosing one
6 sender.

7 I think that that's an area that remains from a
8 marketer's standpoint, and Trevor and others may be able
9 to comment because the marketers are their clients, but
10 there is still some confusion, and in essence, I think
11 there is still reluctance to use some Email in that
12 instance of joint marketing, and I think once the Trade
13 Commission comes forward with its final rule and we put
14 our comments in, and I know this is not to discuss that
15 rulemaking in that sense, but that will open up a new
16 area of at least some experimentation and some view of
17 how it goes.

18 So that I think that there has to be the Trade
19 Commission -- one thing to come out of that rule is to
20 again take a look from an enforcement standpoint which I
21 think is important. We need to have good enforcement
22 here in order to build this trust to be able to have
23 this channel of marketing work, just like the opt-outs
24 have to work, and DMA praises the FTC for setting up
25 that Email account and then going after people who

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1 weren't honoring the opt-out. We need to get rid of
2 them.

3 I think we're going to have to do a new look as
4 we go forward into joint marketing. As that becomes
5 settled in CAN-SPAM, I think there's going to be a bit
6 more look to try to think about joint marketing in that
7 area, and that's a new arena to look at in the
8 short-term future.

9 MS. HARRINGTON-MCBRIDE: I'm not going to report
10 to you, Jerry, and everyone else on this call and anyone
11 who might read this transcript that there is happily an
12 entirely different team at the FTC tasked with
13 completing what we call a discretionary rulemaking, and
14 that I believe is an issue, the question of multiple
15 senders and the conundrum that that may present is being
16 addressed by some colleagues of ours, but happily
17 enough, our focus today is even narrower. We don't have
18 to grapple with that tough one.

19 (Discussion off the record.)

20 MS. HARRINGTON-MCBRIDE: We're not supposed to
21 have to have any commercial endorsements in the
22 transcript, so we might have something that we might
23 want to delete.

24 We want to talk a little bit about the second
25 question Congress has an interest in getting answers to,

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1 and that is to what extent does the international
2 transmission of Email impact the effectiveness of
3 CAN-SPAM, and you all are probably well aware that the
4 FTC works with various international organizations to
5 monitor Email trends and laws, and we have several
6 initiatives that we've under taken with other countries,
7 the London Action Plan and others, where we're working
8 to try to cooperate as best we can with law enforcement
9 officials in other countries and to try to get out the
10 message of securing servers and other consumer education
11 messages that might help to stanch the flow of spam.

12 In addition to those efforts, any information
13 about what other initiatives or policy positions the
14 United States could pursue regarding international
15 Email?

16 MR. HUGHES: Katie, this is Trevor. One of the
17 things, we actually provide a compliance guide for spam
18 laws around the world for our members. It's now two
19 three-inch binders thick. We have found that there are
20 vastly differing standards around the world, and I do
21 not think that harmonization is a goal that is
22 attainable.

23 There really are cultural and political
24 differences that drive standards, and given that that's
25 probably off the table as a possible area of success in

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1 the international field, it seems to me that the things
2 that the FTC is engaged in right now are really the
3 important things to be doing internationally.
4 Coordination and support and communication on
5 enforcement efforts, a cooperation with other
6 enforcement agencies around the world to help get some
7 of the important messages about Email hygiene and
8 sending hygiene out there and closing open replace and
9 open proxies is clearly a good thing to be doing.

10 Additionally, we have seen great traction with
11 authentication and reputation in the U.S. markets. I
12 just spoke in London in June at an Email conference, and
13 I have to say they're just not as far along in Europe
14 with regard to authentication as we are here in the
15 U.S., so I think continued promotion and cooperation
16 with sharing information on those types of things would
17 be very helpful as well.

18 MS. HARRINGTON-MCBRIDE: Okay.

19 MR. BAER: This is Josh Baer. If I could add
20 one more thing on the general comments from the question
21 before, I've asked my customers what they think about
22 CAN-SPAM, and I've overwhelmingly heard from them
23 something I don't totally agree with, I think their
24 perspectives are a little bit skewed, which is that it's
25 been a lot of work for them, extra cost and hasn't done

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1 much to fight spam.

2 I hear from other advocates maybe on a different
3 perspective that it's not strict enough and that there
4 should be more limitations and more impact on legitimate
5 marketers, and I think to reiterate Trevor's original
6 point that he started with, CAN-SPAM isn't the solution
7 to spam. It's part of a solution that incorporates
8 technology and industry best practices and other things,
9 but it's only a piece, and I think the law that we have,
10 while there are some tweaks we could do to it to make it
11 better understood or make it work better, it's pretty
12 much the best we can do and the most effective we can do
13 with any law.

14 There's no law that we could pass that would
15 have a bigger impact on actually reducing spam.

16 MS. HARRINGTON-MCBRIDE: Okay. All right. Any
17 other thoughts about international transmission and its
18 affect on CAN-SPAM's effectiveness?

19 MR. CERESALE: This is Jerry from DMA. Really
20 the effects of the CAN-SPAM on the international scene
21 is dependent, we believe, on the ability of the Trade
22 Commission and other American law enforcement
23 organizations to work with their counterparts overseas.

24 Marketers, I mean, we can set our own guidelines
25 and so forth, but outside of working with legitimate

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1 marketers to have them follow outside of the filtering
2 techniques that we've discussed fairly heavily and so
3 forth, it depends upon working of governments to do this
4 across border fraud type initiatives.

5 So I think it's imperative to put in and DMA
6 would support efforts to get some funding and whatever
7 to help law enforcement combat that. You have to be
8 able to have some enforcement in order to at least have
9 this leg, this one leg of trying to combat spam with
10 laws before that enforcement, and you need that
11 cooperation across border.

12 MS. HARRINGTON-MCBRIDE: Any thoughts about
13 whether stricter standards for domain name registrars
14 might aid in battling the spam problem, particularly
15 internationally?

16 MR. JALLI: This is Quinn from Digital Impact.
17 One of the things we've grown comfortable with, and at
18 least I've said in many interviews, is that the biggest
19 common thread of all of the spammers is they forge, they
20 lie and they commit fraud, and I think when we identify
21 those and we seek to root out those problems, we're
22 really getting at the heart of the spam problem.

23 With that in mind I'm not sure that going after
24 domain registrars or imposing new obligations on them as
25 far as spam is concerned is really the answer. However,

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1 I think as far as phishing goes, we may be getting to
2 something that is really useful. I think that because
3 we allow people to register what I would call look alike
4 domains, I think we're opening ourselves up to greater
5 and ongoing phishing problems.

6 So while I know that phishing only comprises a
7 little fraction of the overall spam epidemic, I think it
8 does address an important nuance, and so is something we
9 should consider at least on a go forward basis.

10 MS. HARRINGTON-MCBRIDE: Okay.

11 MR. CERESALE: This is Jerry. I have to say I
12 think it would help on the phishing problem, which may
13 be small now, but if we allow the crack to be there,
14 it's going to become a larger and larger problem. It's
15 really in essence ID theft on a corporation, and I think
16 that a greater control over domain names would help in
17 that instance. There are some examples. I noticed we
18 have some courts going in different directions on this.

19 For example, with Google, there was a court case
20 where they won, people trying to look at hitting domains
21 names or going around it, like typing in mistakes and so
22 forth, and there was kind of a help to help Google in
23 that way from a court decision.

24 Whether that stands, I have no idea whether it
25 will stand on appeal, but I think that we have to think

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1 about it in that way, and we have an opposite kind of
2 court decision. It's not in the Internet space, but in
3 the telephone space with 1-800 Holiday, for Holiday Inn,
4 you're typing in of course holiday. If you type a zero
5 instead of the O in holiday, you get another hotel
6 chain, and it was held that by courts that that was not
7 taking the trademark or trying to play on an error and
8 so forth.

9 So I think that it's possible, as we look at
10 this, that I think that we have to think about from a
11 commerce standpoint kind of a standard to try to see if
12 we can fix it so that errors do not lead to mistaken
13 corporate identity as we look at it, and I think that
14 that comes with distributing the domain names and how it
15 works.

16 I think that that will be a plus for commerce in
17 general going forward on the Internet or whatever in the
18 future that becomes.

19 I know it's important to try and build a brand
20 name, sometimes around web sites, sort of similar to
21 1-800 Flowers in the telephone, build a brand name
22 around the phone number and the way it's written, the
23 vanity number, well, Amazon.com, for example, working on
24 the brand name around the domain name, and we need to
25 try and look to try to protect that, to try and prevent

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1 people from sneaking in and grabbing domain names to try
2 and take advantage through phishing or even take
3 advantage through blackmail -- not blackmail. That's a
4 wrong term, but trying to sell it for a high price
5 trying to threaten, we'll give it to a competitor if you
6 don't pay me to have me transfer the domain name over,
7 that kind of thing that's happened also already in the
8 telephone arena.

9 MR. ISAACSON: This is Ben Isaacson for Experian
10 and Cheetah Mail. I just want to talk about coming back
11 to the role of authentication in Email, the ESPC is very
12 much engaged in the advocacy of authentication, and one
13 point I would like to make here is that we've taken on
14 the initiative to reach out to domain registrars to help
15 with the authentication process because what we've found
16 is a great, great majority of domain names that are
17 registered are not big company domains that are well
18 endowed resources to establish that their domain name
19 matches the Internet protocol addresses they'll be
20 sending from.

21 The fact is that these registrars could play a
22 pivotal role in providing the everyday domain
23 registrant, the Isaacson.org domain registrant with the
24 opportunity to point to the IP address that they plan on
25 using to send Email, and in fact we're drafting a letter

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1 and working with a number of different entities,
2 including the ISPs that cosigned this, so that
3 registrars can help facilitate that authentication
4 process at the point of acquisition of the domain name,
5 and therefore contribute to the overall differentiation
6 between legitimate domains and those that are sending
7 spam and phishing.

8 MS. HARRINGTON-MCBRIDE: Okay. I hate to cut it
9 off, but let me say if you have further thoughts about
10 this and it's something you're not able to get to in
11 today's call, we're going to provide you with an Email
12 address to which you can send any supplementary thoughts
13 or comments, any studies you might want to send along,
14 any thoughts about experts we should be talking to in
15 addition to yourself, but I would like to move to our
16 third topic because we've got four to cover, and I know
17 that time is getting short.

18 The third issue is how we can best protect
19 consumers, especially children, from receipt and viewing
20 of pornographic or obscene content in Email. As you all
21 know, the CAN-SPAM Act contains provisions about this,
22 and it directed the FTC to do a rule-making which was
23 completed last April which we called the sexually
24 explicitly labeling rule because indeed it requires all
25 sexually explicit Emails to be labeled as such.

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1 It also requires sort of Brown Paper Wrapper
2 effect, if you will, where the obscene or pornographic
3 content should not be viewable immediately but rather
4 should be viewable only if an affirmative act is taken
5 by the recipient such as clicking on a link.

6 We can talk about that provision, and we can
7 certainly talk beyond that about other solutions in the
8 marketplace, but to what extent is further protection
9 necessary for recipients, especially children, in
10 protecting them from obscene and pornographic Emails?

11 MR. HUGHES: Katie, it's Trevor. In many ways,
12 I think that this issue is almost a microcosm of the
13 broader systemic issues that we have in Email, the lack
14 of accountability. We call it the impunity of anonymity
15 where people really can send Email with impunity and
16 without fear of reprisal, and I think there's a couple
17 things here.

18 One is that the most effective tool in response
19 to this is enforcement, enforcement, enforcement, and
20 for that reason, I think the Commission is to be
21 applauded for the settlements that were announced just
22 last week. I think we need many, many more of those
23 types of settlements in order for us to start to see
24 some changes in the marketplace, so we would strongly
25 encourage the Commission to continue that good work.

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1 In fact, we would be supportive. This echoes
2 chose something Jerry said earlier, that we would be
3 supportive of appropriations being made and a request
4 going back to Congress for additional funding for
5 exactly this type of purpose. It is really important
6 that there be a very aggressive enforcement era.

7 I think, and ESPC thinks that that's probably
8 the best tool we've had in place, we've never been great
9 supportive and have not thought that labeling is the
10 best solution for this type of problem, but if it's
11 working at all and it helps in enforcement, then great.

12 One thing we've seen emerge recently is the idea
13 of a child registry in Michigan and Utah. Both states
14 passed last year laws that would require a child
15 registry to be created, and they're actually in the
16 process of implementing those right now.

17 We think that these are particularly bad
18 solutions. These are again smaller versions of the
19 broader Do Not Email concept that was proposed during
20 the passage of the CAN-SPAM Act in which the FTC created
21 I think a very strong and well thought out report to
22 Congress on.

23 We have real concerns about the security, about
24 the scaleability and about the effectiveness of these Do
25 Not Email solutions in the marketplace, whether they be

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1 related to kids specifically as we see in Michigan and
2 Utah, or more broadly as a solution to spam in its
3 entirety.

4 MR. CERESALE: This is Jerry from DMA. I have
5 to really reinforce what Trevor said there, especially
6 the view of a registry of Email addresses that are
7 assigned to children or that children use very often I
8 think creates some real potential problems and may
9 actually be counterproductive. You're trying to prevent
10 children getting pornography, or in those states of
11 Michigan and Utah, it's not just pornography, tobacco
12 and alcohol as well.

13 (Brief Technical Difficulty with Conference
14 Call.)

15 (Discussion off the record.)

16 MS. HARRINGTON-MCBRIDE: We'll pick up here now.

17 MR. GOODMAN: This is Josh. I was just saying a
18 lot of this is based on authentication. Once we have
19 that, I think the existing tools that we have become a
20 lot more useful. As Trevor said, I think with the Utah
21 and Michigan laws, this is an example of really going
22 against some of the real great benefits of CAN-SPAM.

23 One of the real reasons it was supported so
24 stronger was to help avoid having many disparate, at the
25 time something like 32 or 36 different state laws that

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1 senders had to comply with, and having seen already two
2 different registries that now senders are supposed to be
3 checking against before they send to, the implications
4 of where this goes are just almost unthinkable for
5 senders. It becomes very impractical.

6 MS. HARRINGTON-MCBRIDE: I have two specific
7 follow-up questions. I know that some of you have
8 expressed a concern about a labeling approach, but is
9 there any evidence you have about the approach that's
10 been taken? I understand the concerns about anonymity,
11 but to the extent that you have even data about
12 compliance rates with this provision, it would be
13 helpful to know that, and if you have any suggestions
14 for other approaches that might be taken as sort of a
15 fundamental principle that it's difficult to find
16 spammers, but again if you're talking about this that
17 are willing to comply and concerned about compliance, is
18 this approach one that is effective?

19 MR. JALLI: Katie, this is Quinn from Digital
20 Impact. We have really two issues with what we were
21 just asked. One, I can pretty safely say, I can
22 actually definitively say that not a single person on
23 this call sends material that would be labeled as
24 sexually explicit. I think that we all pretty much
25 agree that this is not the stuff that we send out on

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1 behalf of our clients.

2 More to the point, I think it really highlights
3 this mythological, this Holy Grail of legislative intent
4 that we are able to deal with all the bads actors of the
5 world with laws, and frankly I think that there is no
6 legislative approach that will adequately deal with the
7 problem we're facing, which is people who simply don't
8 want to comply with the law. They know there's the law
9 out there, and they frankly ignore it.

10 They ignored the ADV labels when they were I
11 believe at the 14 different state levels. They
12 continued to ignore it to a large degree on the adult
13 material that we send out, and so the question comes to,
14 can we do anything differently that will make them want
15 to comply, and the answer of course is probably not
16 because they're not complying with CAN-SPAM on many
17 levels, not the least of which they're forging header
18 information so that they can actually get access to the
19 ISPs they're sending to.

20 So I think it's not an unworthy question, but I
21 think it's one that really has an elusive answer.

22 MR. BAER: This is Josh Baer. We don't send any
23 adult content off our network, but we do have one client
24 that has purchased our software that runs an adult web
25 site, and from my limited experience there, what I would

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1 generalize away from it is that the people out there
2 doing it right are very concerned with doing it right
3 because they know they're in a sensitive area, and so I
4 know that the client that we have is very concerned
5 about these issues.

6 Any time a new law comes out, they're very
7 careful to review them and make sure they're in
8 compliance, and I would expect that the legitimate
9 companies out there in that industry, which I'm sure
10 there are some, will attempt to follow all these rules,
11 and for them it may be helpful. Unfortunately, again I
12 don't mean to talk about this industry, but it seems
13 like it's quite full of many illegitimate players as
14 well in many offshore facilities, and I think that's
15 where it's going to be very ineffective.

16 MS. HARRINGTON-MCBRIDE: Does anybody have any
17 thoughts about additional approaches that can be taken
18 either approaches that are being taken now by ISPs or by
19 consumers installing their own software to block or
20 approaches that could be taken in future to best protect
21 recipient especially children from viewing pornographic
22 Email?

23 MR. BAER: I would think, if anything, it would
24 be a technology solution. It would be some sort of very
25 sophisticated content protection software similar to

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1 like they have that you can install on computers now to
2 protect against certain web sites, content, phrases and
3 that sort of thing.

4 MS. HARRINGTON-MCBRIDE: Okay.

5 MR. JALLI: This is Quinn Jalli. I think we can
6 stand by the old guidance that parents need to supervise
7 their children's behavior online and protect them from
8 doing things that are going to put their Email address
9 at risk. Frankly I have three Email addresses that
10 don't get a single piece of adult spam because I have
11 not made those addresses readily accessible to spammers,
12 so it's the same advice we've been giving, just given in
13 the past but it needs to be followed.

14 MS. HARRINGTON-MCBRIDE: Okay. We have about
15 25 minutes or so left, and I would like to move on to
16 talk about the specific provisions of the Act. We'll
17 take these in pairs and triples at various times because
18 some of them are related enough to talk about them in
19 those groupings.

20 We'll begin just sort of going through the Act
21 one by one. Criminal provisions come first
22 chronologically in the Act. Any thoughts about the
23 Act's criminal provisions or their enforcement, how
24 effective these provisions have been as a deterrent?

25 MR. HUGHES: Katie, this is Trevor. I want to
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1 speak generally to the criminal provisions and also just
2 enforcement under the Act. We think that enforcement is
3 critical, and that the best tool that we have coming out
4 of legislation is the deterrent effect of very visible,
5 very high profile enforcement actions.

6 So whether it's under the general business
7 practices sections of the Act or the criminal sections
8 of the Act, we cannot encourage enough strong and robust
9 enforcement of the CAN-SPAM Act. I've said many times,
10 and I say it tongue in cheek, but I'm somewhat serious
11 too, that I think we will start to see spammers looking
12 for other jobs when we see more spammers on the
13 6 o'clock news with a rain coat over their head coming
14 out of the Federal District Courthouse.

15 Those are the types of images that we need in
16 order for spammers to get the message that they need to
17 find another line of work. So regardless of under which
18 part of the Act it is, seeing additional enforcement is
19 really necessary, and for that reason we're supportive
20 of additional funding and requests for appropriations
21 under the CAN-SPAM Act cart.

22 MR. JALLI: This is Quinn from Digital Impact.
23 The criminal provisions are the most important at least
24 from the perspective of actually fighting spam, the most
25 important section of CAN-SPAM, and the reason I say that

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1 is from an enforcement perspective, spammers are forced
2 to forge their identify. If they did not, if they
3 maintained a consistent identity and sent from a static
4 IP address, ISPs could deal with spammers on a
5 one-on-one basis, but because they do not, because they
6 forge who they are and who they're sending from and they
7 steal accounts, the most important provision of CAN-SPAM
8 is the criminal provisions that allows us to target the
9 very behavior that all spammers employ to get their
10 Email into ISPs.

11 MS. HARRINGTON-MCBRIDE: Any thoughts about the
12 adequacy of the criminal penalties in the Act?

13 MR. BAER: This is Josh Baer. I think when I
14 think about those things today, I generally think about
15 them in a larger context of other fraud and trespass
16 type laws that also typically are applied in these
17 scenarios, and I find that once you're at the point
18 where you know who to sue, those other things are
19 typically adequate and significant.

20 I completely support Trevor's point, that the
21 more we want to see impact on and see results of other
22 people being prosecuted, the better. It seems to me
23 likes those things are often very adequate because when
24 people are sending really bad Emails, they're being
25 deceptive, and they're stealing people's personal

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1 information, and they're violating privacy policies and
2 they're doing a lot of really bad things that are
3 already illegal.

4 MS. HARRINGTON-MCBRIDE: Okay. Let's move on
5 and talk about the various civil provisions we have.
6 We'll take the first two of these which are related.
7 That is the Act prohibits both false header information
8 and deceptive subject lines. How effective have these
9 two provisions been? How important are they? What have
10 you to say about our enforcement of them?

11 MR. HUGHES: I'm sorry, Katie. I was pulled
12 away. What was it you said?

13 MS. HARRINGTON-MCBRIDE: We're talking now,
14 Trevor, about the deceptive subject line and false
15 header provisions in the civil part of the Act that
16 gives FTC enforcement authority of those things.

17 MR. HUGHES: Yes. So this is Trevor again. I
18 think that legitimate senders are well on sides of this
19 issue, and that as Josh was saying and Quinn was saying
20 previously, we don't see a lot of problems in this area
21 because it's just good existing business practice and
22 sort of logical for legitimate senders to be following
23 these standards, so they were somewhat common sensical,
24 if that's a word, for legitimate senders to follow these
25 standards.

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1 For spammers, this is their tools of the trade.
2 They live by falsifying and using deceptive headers and
3 subject lines, so this really is almost one of the main
4 pivot points in the Email world, that legitimate senders
5 just are nowhere near to violating these standards
6 whereas spammers violate them with pretty much every
7 single message they send.

8 MR. BAER: Is Josh Baer. I couldn't agree more.
9 I often have to give training sessions and speak about
10 CAN-SPAM and what it means for marketers, and we usually
11 start it off in our little CAN-SPAM 101 by saying, Hey,
12 what does this mean for legitimate marketers, and our
13 answer is, it doesn't change that much. You already
14 weren't sending deceptive subject lines, you already had
15 clear contact information on Emails you send because
16 that was already a best practice, you already honor your
17 unsubscribes. All right, here are some other things
18 that you're going to have to do to work with partners or
19 when you did this other special case, but for the most
20 part, nothing really changed.

21 That's good. They're all doing the right
22 things.

23 MS. HARRINGTON-MCBRIDE: Okay. Next let's talk
24 about the opt-out provisions of the Act, and this
25 includes, of course, a requirement that every commercial

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1 Email include clear and conspicuous notice of the
2 recipient's right to opt-out, a requirement that
3 commercial Emails include a functioning return address
4 or other opt-out mechanisms, and the ultimate
5 requirement that opt-outs be honored.

6 How important and effective are these provisions
7 and is any change necessary?

8 MR. JALLI: This is Quinn from Digital Impact.
9 As part of the standard operating procedures for
10 companies like the ones on this call, it's something we
11 would require wrong before CAN-SPAM ever went into
12 effect. I will say this, though, I think one of the
13 things that I like about the provision most is the
14 flexibility to forward the sender in the sense that it
15 allows senders to either use a one click opt-out
16 mechanism or take them to a prescription management page
17 where they can actually change settings on an individual
18 list basis.

19 So for instance if a client were offering mini
20 newsletters, that recipient has the ability to be
21 granular in the opt-out. We think that it showed a lot
22 of insight on Congress's part, and we're very thankful
23 for it, so I think this is a great provision. It's
24 something we were all doing well before the Act went
25 into effect.

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1 MS. HARRINGTON-MCBRIDE: Ago.

2 MR. CERESALE: This is Jerry. The opt-out
3 requirement is great. It gives some flexibility.
4 Marketers are trying different ways to look at it.
5 Sometimes if you offer too many choices in the opt-out,
6 it becomes scary to the consumer, so that they're
7 working on that to try to do as best they can with that
8 and the ability also to do brand names differently so a
9 company -- I'll use an example that we always use
10 Procter and Gamble, doesn't have to have an opt-out for
11 all Procter and Gamble can do for Tide, for Crest, et
12 cetera, which we think helps give some flexibility to
13 marketers, and we think that that is absolutely great.

14 I do want to say that we think from my
15 membership point of view the opt-out works, and I think
16 that you guys, others on the phone should chime in, it
17 works in the ability that there is enough time, the
18 process that the FTC has given us in the rule and
19 Congress gave us in the law, there is time to have it
20 work.

21 It has to work for 30 days, and after the Email
22 is sent, the opt-out, you have ten days to work on it,
23 to make sure it's effective, and that gives opportunity
24 for my members to actually work and comply fully with
25 the opt-out requirement. Pan.

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1 I don't know if anybody wants to talk about
2 that.

3 MR. HUGHES: Jerry, yes, if I can jump in. This
4 is Trevor again, Katie. We've really talked about the
5 opt-out fully in our comments on the most recent round
6 of comments for the notice of proposed rulemaking on the
7 move from a ten day to a three day opt-out.

8 I think that the message that we would like to
9 convey though is that there are some challenges with
10 opt-out, that all of the members of ESPC tell me they
11 can process opt-outs immediately, except that that is
12 processed through a single channel and a single client,
13 but they need to pass that opt-out back to their client
14 or customer who then needs to possibly run that
15 suppression file against a whole bunch of other
16 marketing channels, a whole bunch of other communication
17 channels, maybe needs to push it out to other vendors,
18 other partners, and that process can take a fair amount
19 of time.

20 For that reason, the opt-out processing period
21 that is in the CAN-SPAM Act is something that is much
22 more workable and much more feasible for legitimate
23 businesses than the three days. I think it's notable
24 that the Telemarketing Sales Rule has a 30-day
25 processing period for the Do Not Call List. I think

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1 it's appropriate to have enough time for legitimate
2 businesses to respond.

3 The other thing about the opt-out, and we may
4 raise this later in our discussions, and it's also part
5 of our comments on the current notice of proposed
6 rulemaking, is that opt-outs can be very challenging in
7 multiple sender situations or situations where list
8 rental with an advertiser/list renter is involved, and
9 that's based on the definitional structure in the
10 CAN-SPAM Act where it is possible for there to not only
11 be multiple senders of a message, but also that the
12 sender is defined essentially as the advertiser within
13 the message, and as a result, a list owner or a list
14 renter that is not advertised in the message but is
15 otherwise responsible for the names that are being sent
16 to can sometimes duck the opt-out requirement and pass
17 it back to the advertiser that happens to be renting
18 their list.

19 So we're encouraged that the FTC has seen sort
20 of these sophisticated twists and turns within the
21 CAN-SPAM Act and is working to address a number of those
22 issues, but they most definitely are issues that have
23 been raised under the opt-out provisions in the Act.

24 MS. HARRINGTON-MCBRIDE: Okay. Let's talk about
25 a pair of provisions, two disclosures that have to be

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1 contained in every commercial Email, in addition to what
2 we've already talked about, which is notice of your
3 right to opt-out, there are two others. One is an
4 identifier that the message is an advertisement or
5 solicitation. The other is that the valid physical
6 postal address of the sender has to be included.

7 Talk to me about the effectiveness of those
8 provisions.

9 MR. HUGHES: This is Trevor. Valid physical
10 postal office, now that we have clarification from the
11 FTC, I think is reality straight forward, and we see it
12 as a best practice. It I don't think has caused undue
13 pain or concern in the legitimate sending community.

14 The other you mentioned was clear and
15 conspicuous notice that it's an advertisement or
16 promotion, and I think generally again that's been
17 fairly straightforward. We are generally looking at
18 documents like DOT COM disclosures from the FTC as our
19 guidance for those types of disclosures, and I have not
20 heard or seen much significant concern about those
21 disclosure requirements from our members.

22 MS. HARRINGTON-MCBRIDE: Okay.

23 MR. CERESALE: This is Jerry in DMA. We have
24 found in working with we partnered with SlamSpam with
25 the FBI through the white collar crime, that they find

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1 that the valid postal address gives them a technical
2 means to trip up some spammers, who don't have what
3 would be a valid postal address, a place where they can
4 be found, a technical means to trip them up on violating
5 the law where they don't have to try and go and prove or
6 get some fraud or some intent issues on it.

7 So from that score, as part of enforcement when
8 you go with a panoply of offenses, that the valid postal
9 address as well as some of the other technical things in
10 the CAN-SPAM Act actually assist enforcement for them
11 because you either have a valid address or you don't,
12 and so it's enough to go with intent or knowledge or
13 types of standards.

14 MR. ISAACSON: This is Ben Isaacson with
15 Experian and Cheetah Mail. I just want to comment and
16 commend really Congress and the Commission for
17 continuing to enable the identification of a message ad
18 commercial, to maintain the flexibility to use different
19 terms on terminology or positioning within a message
20 because I think the concern would be similar to the
21 subject line, that there would be a label that would be
22 required that would be very specific and that ISPs or
23 anti-spam advocates would use that label to filter
24 legitimate messaging in addition to spam.

25 So I would just like to take this moment to

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1 commend the Commission as well as the foresight of
2 Congress to maintain the flexibility of that identifier.

3 MS. HARRINGTON-MCBRIDE: All right. What
4 thoughts do you all have about the penalties in the Act?
5 We've talked a little bit about that, and about the
6 aggravated violations provisions that makes, among other
7 things, dictionary attaches and harvesting subject to
8 additional fines if they're paired with primary
9 violations of the Act?

10 MR. CERESALE: This is Jerry. On a policy
11 level, we think that the additional aggravated penalties
12 sounds great. I'm not certain where I have seen this
13 work in enforcement. I'm not sure from an enforcement
14 point of view whether or not that assists the AGs or the
15 FTC in trying to move forward in looking at dictionary
16 attack, et cetera.

17 MR. BAER: Again I guess with regard to the
18 aggravated violations, this was not generally a problem,
19 not really any problem for our members and legitimate
20 senders more generally, and dictionary attacks and the
21 other types of aggravated violations, if we could see
22 more enforcement, more successful enforcements in that
23 area I think it would be very helpful.

24 MS. HARRINGTON-MCBRIDGE: Okay. Let's talk for
25 a minute about provisions in the Act that prohibit the

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1 promotion of person's trade or business in a commercial
2 Email, the transmission of which violates the false or
3 misleading header information provision. This is
4 subject to FTC enforcement only.

5 Any thoughts about the efficacy of that
6 provision?

7 MR. HUGHES: I don't have any specific thoughts
8 on that. This is very Trevor.

9 MS. HARRINGTON-MCBRIDE: What about preemption
10 of state laws by the CAN-SPAM Act, any thoughts about
11 that?

12 MR. HUGHES: A lot. This is Trevor again. One
13 of the most important things that the CAN-SPAM Act did,
14 and I think this can be a goal that can be identified
15 and recognized and checked off as at least initially
16 successful, was it created a common platform for
17 legitimate businesses to understand what was onside and
18 what was offside with regards to commercial Email.

19 The CAN-SPAM Act ostensibly preempted some 37
20 state laws at the time of its passage, and those state
21 laws were creating really a crazy quilt of standards
22 that legitimate Email senders were really having a
23 daunting challenge to respond to.

24 Since that time, most states have recognized the
25 preemption in the CAN-SPAM Act and have not been passing

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1 laws specifically focused on commercial Email. We have
2 seen some developments around fraud and deception which
3 are carved out under the preemption, and generally those
4 have been I think supportable or allowable. In fact,
5 there's a Virginia statute that we were talking about
6 just recently, and I think there's general sense that
7 laws like the Virginia laws have been helpful, have been
8 useful.

9 We do have concerns though, and these come up
10 specifically with the Michigan and the Utah child
11 registries which are just in the process of going into
12 effect, that there are laws that are being passed that
13 we feel, many feel are preempted under the CAN-SPAM Act,
14 but in order for that preemption to be given effect, a
15 lawsuit has to occur.

16 So legitimate businesses are right now with
17 regards to Michigan and Utah in the somewhat untenable
18 situation of either not complying and waiting for a
19 lawsuit to be filed against them and immediately filing
20 a motion for summary judgment and claiming preemption
21 under the federal CAN-SPAM statute, or alternatively,
22 complying and struggling under what is a really bad
23 solution in these two states that creates very expensive
24 and challenging compliance obligations for legitimate
25 senders.

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1 I guess there's even a third possibility, and
2 that is preemptively filing a lawsuit, but the problem
3 with that is that specifically with the Michigan and
4 Utah registries, the media associated with bringing a
5 lawsuit against a child spam registry is not good, and I
6 don't think there are many businesses that are willing
7 to step up to that task, to say nothing of the cost
8 associated with bringing that lawsuit.

9 So we are very, very supportive of the
10 preemption provisions within the CAN-SPAM Act. We
11 remain greatly concerned about some of the State laws
12 that have emerged, and that there are real challenges
13 with giving affect to the preemption provisions of the
14 CAN-SPAM Act and would look for or would be very open to
15 perhaps broadening of the preemption provisions, still
16 with a carve out for fraud and criminal standards, but
17 broadening it to make it very clear in sending an even
18 clearer message to the states that the CAN-SPAM Act is
19 the law on commercial Email.

20 MS. HARRINGTON-MCBRIDE: Okay.

21 MR. CERESALE: This is Jerry. I have to back
22 Trevor. One of the problems, however, that you see in
23 the Michigan and Utah laws is that they have just stated
24 if you send an Email to someone on that list that is
25 trying to sell something to a child that can't be

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1 purchased by a child, that becomes a criminal violations
2 as a means to try to get around the CAN-SPAM Act
3 preemption, so I think we have an issue there with
4 states trying to be creative to thwart -- the thought
5 that we see was to thwart the efforts of the CAN-SPAM
6 Act as a uniform rule.

7 We kept open trespass and that kind of thing,
8 and criminal statutes, straight fraud statutes open so
9 we wouldn't interfere with the states, but now they're
10 trying to take that and create technical Email
11 regulations and just trying to call them criminal, and
12 Trevor is right that we just don't see going at -- it's
13 very difficult on the PR situation and very difficult to
14 try and say what states might do in trying to protect
15 and keep this preemption.

16 We've even seen in other areas like in the
17 telephone area with State Attorneys General actually
18 starting to put on web sites to urge citizens to write
19 to particular companies and trying to talk about
20 preemption in the telephone area and trying to really
21 harm their business through that type of area, so it's
22 very, very difficult for businesses in this arena to try
23 and push the preemption.

24 And I think that we need to be pretty strong
25 here that there is federal preemption and would hope

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1 that the Trade Commission would push that in their
2 review to keep this and potentially make it stronger so
3 that we don't have states trying to bypass the spirit of
4 the CAN-SPAM Act.

5 MS. HARRINGTON-MCBRIDE: Okay. I'm going to let
6 that be the last word on this call about that provision,
7 and I'm going to say that if you have anything further
8 on the wireless rulemaking by the FCC, I know we talked
9 about that a little bit, if you have any further
10 thoughts about the effectiveness of that provision of
11 CAN-SPAM or if you have any thoughts about what we've
12 talked about today, any data you think we specifically
13 ought to be reviewing, we have an awfully large pile of
14 data we're reviewing, but please feel free to add to our
15 stack, if it's duplicative, if you have suggestions.

16 Don't trouble yourself to send whole copies, but
17 if you have titles you think we ought to be reviewing,
18 experts you think we ought to be talking to, people we
19 ought to be interviewing, we're very keen to hear about
20 that. We're wrapping up this phase of our work, and
21 we're really keen to get any suggestions you might have
22 by the middle of August.

23 You can feel free to Email any of us. I'll give
24 you my Email address. It's cmcbride@ftc.gov. That's C
25 M C B R I D E @ F T C . G O V, and we will be very glad

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1 to hear from you.

2 I would like to thank you each for
3 participating, and to let you know one of your prizes
4 for participating is the further opportunity to do work
5 on this project, and that is we'll be making copies of
6 the transcripts from today's call available to each of
7 you who have participated and giving you the opportunity
8 to review those transcripts and make any necessary
9 corrections.

10 Because there are so many participants on our
11 various calls, it would be most helpful to us if you
12 would provide us your edits in red line form so we can
13 readily see what mistakes may be in the transcript and
14 make the necessary changes and finalize the record.

15 Allyson Himelfarb is the contact person, and
16 she'll be in touch with her as soon as the transcripts
17 are ready.

18 Again I want to thank you each for participating
19 in today's call. It was a very lively and interesting
20 discussion and will provide us with still more
21 information that we will need as we go forward to
22 compile this report to Congress and to try to give the
23 best guidance we can about how effective the Act has
24 been and any changes that might be necessary.

25 So I thank you all very much for taking time out

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1 of your day, and we'll look forward to continuing the
2 dialogue as we know doubt will.

3 (Whereupon, at 5:02 p.m. the conference was
4 concluded.)

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1 CERTIFICATE OF REPORTER

2

3 DOCKET/FILE NUMBER: P044405

4 CASE TITLE: REPORT TO CONGRESS

5 HEARING DATE: JULY 27, 2005

6

7 I HEREBY CERTIFY that the transcript contained
8 herein is a full and accurate transcript of the steno
9 notes transcribed by me on the above cause before the
10 FEDERAL TRADE COMMISSION to the best of my knowledge and
11 belief.

12

13 DATED: AUGUST 10, 2005

14

15

16

DEBRA L. MAHEUX

17

18

CERTIFICATION OF PROOFREADER

19

20 I HEREBY CERTIFY that I proofread the
21 transcript for accuracy in spelling, hyphenation,
22 punctuation and format.

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